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No. 07-742

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IN THE

Supreme Court of the United States

BEVERLY BOULEVARD, LLC,

Petitioner,

v.

CITY OF WEST HOLLYWOOD and
WEST HOLLYWOOD COMMUNITY
DEVELOPMENT DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that a property owner who unlawfully erected tall wall signs had no protectable property right under California's Outdoor Advertising Act (California Business & Professions Code § 5200, *et seq.*)

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OPINIONS BELOW

In a unanimous, unpublished memorandum disposition, filed June 5, 2007, the Ninth Circuit affirmed in part, reversed and vacated in part, and dismissed in part the decision of the District Court on cross-motions for summary judgment. The decisions of the Court of Appeals (Petitioner's App. 1-7) and the District Court (Petitioner's App. 15-55) are reproduced in the appendices to the Petition.

STATUTORY PROVISIONS INVOLVED

California Outdoor Advertising Act, Business & Professions Code § 5412:

> Notwithstanding any other provision of this chapter, no advertising display which was lawfully erected anywhere within this state shall be compelled to be removed, nor shall its customary maintenance or use be limited, whether or not the removal or limitation is pursuant to or because of this chapter or any other law, ordinance, or regulation of any governmental entity, without payment of compensation, as defined in the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), except as provided in Sections 5412.1, 5412.2, and 5412.3. The compensation shall be paid to the owner or owners of the advertising display and the owner or owners of the land upon which the display is located.

This section applies to all displays which were lawfully erected in compliance with state laws and local ordinances in effect when the displays were erected if the displays were in existence on November 6, 1978, or lawfully erected after November 6, 1978, regardless of whether the displays have become nonconforming or have been provided an amortization period. This section does not apply to on-premise displays as specified in Section 5272 or to displays which are relocated by mutual agreement between the display owner and the local entity.

"Relocation," as used in this section, includes removal of a display and construction of a new display to substitute for the display removed.

It is a policy of this state to encourage local entities and display owners to enter into relocation agreements which allow local entities to continue development in a planned manner without expenditure of public funds while allowing the continued maintenance of private investment and a medium of public communication. Cities, counties, cities and counties, and all other local entities are specifically empowered to enter into relocation agreements on whatever terms are agreeable to the display owner and the city, county, city and county, or other local entity, and to adopt ordinances or resolutions providing for relocation of displays.

California Outdoor Advertising Act, Business & Professions Code § 5216.1

> "Lawfully erected" means, in reference to advertising displays, advertising displays which were erected in compliance with state laws and local ordinances in effect at the time of their erection or which were subsequently brought into full compliance with state laws and local ordinances, except that the term does not apply to any advertising display whose use is modified after erection in a manner which causes it to become illegal. There shall be a rebuttable presumption pursuant to Section 606 of the Evidence Code that an advertising display is lawfully erected if it has been in existence for a period of five years or longer without the owner having received written notice during that period from a governmental entity stating that the display was not lawfully erected.

West Hollywood Municipal Code Section 19.34.010 Purpose.

> This chapter provides standards for on-site and off-site signs to safeguard life, health, property, safety, and public welfare, while encouraging creativity, variety and compatibility, and enhancement of the city's image. The provisions of this chapter are intended to:
>
> A. Encourage creative and well-designed signs that contribute in a positive way to the city's visual environment, express local character, and help develop a distinctive image for the city.

B. Encourage signs that are responsive to the aesthetics and character of their particular location, adjacent buildings and uses, and the surrounding neighborhood. Signs should be compatible and integrated with the building's architectural design and with other signs on the property.

C. Recognize that signs are a necessary form of communication, and provide flexibility within the sign review and approval process to allow for unique circumstances and creativity.

STATEMENT OF CASE

The City of West Hollywood consists of not quite two square miles of fully developed area in Los Angeles County. West Hollywood is primarily residential but enjoys a few distinct commercial areas, including the intensely urban Sunset Strip and a quaint and hip part of town along Melrose Avenue and Beverly Boulevard dominated by smaller shops, many associated with the design industry.

Petitioner owns an 8-story building on Beverly Boulevard in West Hollywood and, as can be seen from the photos in Petitioner's Appendix F (App. 63-65), the building is otherwise surrounded by two story structures dressed with awnings on a street lined with trees.

Sunset Boulevard is designed and developed to be vibrant and commercial. Advertising displays on Sunset Strip are plentiful and many are innovative, award-

winning and competitive. The boulevard is marked by nightclubs and restaurants. It is not uncommon to find bumper to bumper traffic along Sunset Strip at 2:00 in the morning, even on a weeknight.

The City allows "tall wall" signs along the Sunset Strip. A "tall wall" sign is a large off-site advertising sign affixed to the side of a building.

The City's sign regulations have been adopted for the purpose of promoting traffic safety and aesthetic considerations. WHMC §19.34.010. The City submitted extensive evidence in the trial court to support both justifications.

In late 2000, Plaintiff erected two multi-story murals on either side of a building located at 8899 Beverly Boulevard. When they first appeared, the City received citizen complaints. A City Code Compliance Officer inspected the images on the sides of the building to determine whether the images were in violation of any provision of the City's zoning ordinance. One mural consisted of a multi-colored abstract image, the apparent replication of Andy Warhol's Marilyn Monroe portrait, a self portrait and in the lower left-hand corner an image depicting the top of what appears to be a replication of Andy Warhol's Campbell's Soup Can. On the other mural was an image of the Statue of Liberty in the foreground with the Declaration of Independence in the background and the Iwo Jima War Memorial depicted above the Statue of Liberty's Crown. Each of the two images covered the majority of the sides of the building.

Up until that time, the City had not anticipated that a property owner would erect an 8-story art mural; so, not surprisingly, the City did not have any regulations in place with respect to such. The City did regulate "tall walls." By letter dated December 11, 2000 then-Planning Division Manager Lisa Heep informed the owners of the building located at 8899 Beverly Boulevard that neither of the murals constituted a violation of local law.

The letter states, in pertinent part, as follows:

> "[a]s it appears that neither of these murals include any form of advertising, such artwork is currently exempt from the sign code. However, I wanted to bring to your attention that should these murals be replaced with any form of advertising signage, this would be in violation of the Code and a citation would be issued."

Thereafter, each of the two murals located on the sides of the building at 8899 Beverly Boulevard was replaced with an advertising sign. One of the signs was an advertisement for the film "Jurassic Park III." That sign included an approximately five story tall image of the film's logo set against a gray background. The sign covered the entire side of the west-facing building. On the other side of the building was draped advertisement for the West Hollywood Veterans Memorial Fund. That sign included the words "West Hollywood Veterans Memorial Fund" above an image of the Statue of Liberty set against a white circle. A series of flags or banners was depicted on the sign below the image of the Statue of Liberty.

On June 11, 2001, the City determined that the two advertising signs violated the zoning ordinance relating to "tall walls" and the property owner was cited.

Since June of 2001, the advertising signs at 8899 Beverly Boulevard have been replaced on a regular and periodic basis with new signs advertising an array of different commercial enterprises.

Petitioner claimed that it had a "protectable property interest" in the signs under the California Outdoor Advertising Act (California Business & Professions Code §5200 et seq.) and that it had a first amendment right to erect these signs where it had previously displayed art murals. After the City cited Petitioner for its illegal off-site tall wall signs, Petitioner filed the instant lawsuit.

The Outdoor Advertising Act ("California OAA") affords billboard owners in California the right to change copy on lawfully erected advertising displays. California Bus. & Prof. Code § 5412; Petitioner's App. 4, App. 28-29. To qualify for the protections outlined in Section 5412, a sign must *both* constitute an "advertising display" as defined by the OAA, *and* have been "lawfully erected" as defined by the OAA. Petitioner's App. 4; App.; App 28-29.

"Lawfully erected" is a term of art defined by the California OAA, in pertinent part, as "advertising displays which were erected in compliance with state laws and local ordinances in effect at the time of their erection." Bus. & Prof. Code § 5216.1; Petitioner's App. 31 fn 5. An advertising display that was not erected in compliance with local ordinances is not protected by the OAA.

The California OAA further provides that "'[a]dvertising display' refers to advertising structures and signs." Bus. & Prof. Code § 5202; Petitioner's App. 30. "Advertising structures" and "signs" are defined by the Act as structures or signs of any character "placed for outdoor advertising purposes." *See* Bus. & Prof. Code §§ 5203, 5221; Petitioner's App. 30.

The District Court's April 18, 2005 ruling addressed the two walls and reached two different results. The District Court found that the ordinance had not violated Petitioner's first amendment rights and concluded that the off-site commercial advertising on the west wall is illegal. However, the District Court distinguished the east wall and found that "plaintiff has protected property rights in the Sign on the East wall of the Beverly Boulevard Building under the OAA [state Outdoor Advertising Act] which the City cannot 'take' without just compensation." Petitioner's App. 32.

The District Court relied on California Business & Professions Code §5412 to determine that the artistic mural on the east wall (though not the west wall) constituted an "advertising display" as defined in the California OAA based on its belief that the website address for the City's Veteran's Memorial Fund was included on the bottom of the sign when it was initially erected. The District Court further relied on Lisa Heep's letter as indicating that the advertising sign had been permitted by the City, concluding that as a result of the City's "permission" it was "lawfully erected" within the meaning of the California OOA.

In its brief memorandum disposition, the Ninth Circuit corrected the District Court's mishandling of the central factual dispute in this case. The Court of Appeals specifically held that the City did *not* concede that a tall wall sign was ever lawfully erected on Petitioner's building. Petitioner's App. 4-5. Because West Hollywood did not permit tall walls in the zone where Petitioner's building is situated and thus the tall wall signs were not "lawfully erected," the Court of Appeals properly applied state law to conclude that Petitioner has no protectable property interests. This petition followed.

MISSTATEMENTS IN THE PETITION

1. Petitioner erroneously asserts that the City's regulation of tall wall signs is for "wholly aesthetic reasons." Petition at i, 9, 17, 18, 20, 22, 24.

The government interests sought to be advanced by the ordinance are aesthetics *and* safety. W.H.M.C. § 19.34.010. In the District Court, the City submitted substantial evidence to support its contention that traffic safety is enhanced by its regulation *and* the City argued that in California the regulation of billboards seeking the attention of motorists advances traffic safety as a matter of law. Indeed, a volume of the excerpts of the record on appeal is devoted to the City's evidence on the issue of traffic safety. Even so, as this Court has noted, the California Supreme Court held as a matter of law that an ordinance prohibiting billboards "designed to be viewed from streets and highways reasonably relates to traffic safety." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981). In its decision, the District Court accepted the City's aesthetic interests as

sufficiently substantial for the purpose of meeting the *Central Hudson*[1] test and therefore denied Petitioner's motion for additional discovery on the "companion issue of traffic safety." Petitioner's App 44, fn 10.

2. Petitioner erroneously asserts that the City submitted no evidence with respect to the issue of aesthetics, relying instead on aesthetic values "personal to those on the city council that voted for it" Petition at 20; *see also* Petition at 4, 24 (contending aesthetic determinations purely "subjective").

Petitioner wrongly characterizes aesthetic consideration as a subjective determination of whether something is ugly. This formulation misses the point. Land use regulation of aesthetics is illustrated by the difference between being in Boston Commons and being in Time Square.

Regulating aesthetics is the task of coordinating development to create an ambiance; planners call it "a sense of place." The City relied on its General Plan, the co-called "constitution" of local land use planning in California,[2] to implement land use policies that allow for a dynamic, intensely urban environment on the Sunset Strip (where tall wall signs are welcome) and a more pedestrian oriented, low scale environment with street trees, awnings and antique shops on Beverly Boulevard

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1. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

2. *Lesher v. City of Walnut Creek*, 52 Cal.3d 531, 540-541 (1990).

where Petitioner owns its building. The City submitted substantial evidence with respect to the basis for its planning considerations. The Ninth Circuit recognized this:

> "The City submitted evidence that the sign code's restrictions on commercial tall walls sought to preserve and augment the differing characters of Sunset Boulevard and other areas of the city. Moreover, "[a]s to whether the City's [aesthetic] interests are served by the Sign Code, we generally defer to the legislative body passing the law." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006). We disagree with Beverly that the sign code is internally inconsistent in encouraging tall wall commercial speech on Sunset Boulevard and generally prohibiting it elsewhere. The City's goal is to channel such speech to Sunset Boulevard, which is known for its flamboyant billboards, while simultaneously maintaining a more reserved aesthetic elsewhere."

Petitioner's App. 6

3. Petitioner erroneously suggests that the City banned tall wall signs altogether. *See* Petition at i, 17, 22, 24

Petitioner inconsistently describes the City's regulation as a "ban [of] an entire mode of communication" [Petition at 24] and as a prohibition on tall wall sign "from all parts of the City not having Sunset Boulevard addresses" [Petition at 22]. To clarify, West Hollywood does not ban tall wall signs. Instead, it permits tall wall signs in certain zones and prohibits them in others.

4. Petitioner erroneously asserts that the east wall contained advertising when it was first installed. Petition at 5

Whether the east wall initially contained advertising was a hotly contested fact that accounts for the difference between the District Court's opposite conclusions with respect to the two walls and the Ninth Circuit's decision treating both walls similarly. Indeed, this factual issue was the subject of the City's motion for reconsideration in the District Court. The Ninth Circuit correctly concluded that, whether or not the original mural contained advertising, the City believed that it did not.

> Both [City Planning Manager] Lisa Heep's letter and the City's briefs in the district court plainly made only a conditional concession: that *if* the murals contained no letters intended to advertise *then* they would be lawful. Heep's mistake regarding the premise (that the Veterans mural contained no letters

> intended to advertise) did not amount to a concession regarding the legal conclusion (that it was lawfully erected) relied upon by the district court.

App. 4-5

The Petitioner's Exhibit F, which depicts the east wall with a web site address and thus is "advertising," was *not* the mural that existed in September 2000. Petitioner's Exhibit F at App. 63 depicts the west wall on September 15, 2000. Exhibit F at App. 65 depicts the east wall on December 28, 2000, some three months later and *after* Lisa Heep's letter. The City submitted evidence to establish that the web site address was later added and did not appear on the mural in September 2000, when it first appeared. Ultimately, this factual dispute can be resolved, as the Court of Appeals did, by accepting that, at a minimum, Lisa Heep did not believe that the east wall contained advertising at the time that she issued her letter.

REASONS FOR DENYING THE PETITION

Petitioner offers the instant case as an opportunity to reconsider the *Central Hudson* test and delve back into the parameters for regulating billboards beyond where *Metromedia* fell short. Petition at 4-5. However, this case does not provide the vehicle Petitioner suggests.[3] The decision of the Court of Appeals set forth in its unpublished disposition memorandum is correct under the facts herein and the decision does not serve as precedent nor conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. West Hollywood Limited The Placement Of Tall Wall Billboards To Certain Areas Of The City For Reasons Of Traffic Safety & Aesthetics; This Case Does Not Present An Opportunity To Review Whether Such A Regulation Could Be Justified By Aesthetic Considerations Alone

The central premise of the petition is wrong. The petition states that "[f]or wholly aesthetic reasons, Respondents forbade a specific type of outdoor advertising. . . ." Petition at i. As discussed above, the City did *not* rely wholly on aesthetic reasons and the City submitted extensive evidence with respect to both traffic safety and aesthetic justifications.

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3. It is noteworthy that the Ninth Circuit does not even cite *Metromedia*; this case primarily arose from Petitioner's contention that it had a property interest in the illegal signs arising from application of the state statute (California OAA).

It is true, however, that both the District Court and the Ninth Circuit found that aesthetic considerations were sufficient to justify the City's regulation of tall wall signs. The District Court relied on this Court's guidance in that regard:

> The Supreme Court has repeatedly held that a City's interest in aesthetics constitutes a substantial government interest. *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("it is well settled that the state may legitimately exercise its police powers to advance esthetic values.") and reaffirming the conclusion of the majority in *Metromedia*, the Supreme Court in *Taxpayers for Vincent* found that, the "City's aesthetic interests were sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards." *Id.* Indeed, "the city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

Petitioner's App. 43-44. Likewise, the Court of Appeals relied on *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) to reach its conclusion that the City's aesthetic considerations alone were sufficient.

Nevertheless, while the City agrees with the courts, this case does not squarely present the question the petition purports to pose because (1) in this case the City did not rely wholly on aesthetic grounds and (2) the unpublished opinion has no precedential effect.

2. West Hollywood Has Not Banned Tall Wall Billboards, Merely Limited Them To The Sunset Strip Where, Like The Vegas Strip And New York's Time Square, Traffic Moves Slowly And They Contribute To An Intensely Urban Environment

The petition suggests that this case offers the opportunity to address the possibility that the *Central Hudson* test can be used to support "regulations designed to entirely prohibit commercial and non-commercial speech, like the West Hollywood ordinance here."[4] Petition at 19. However, the City's regulations do not entirely prohibit commercial and non-commercial speech. Not even close. The regulation at issue herein merely limits the zone in which enormous, multi-story signs may be erected. And it does not distinguish between commercial and noncommercial speech.

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4. The petition also repeatedly suggests that tall wall signs represent a new mode of communication and that it may just be time to re-think *Metromedia* and *Central Hudson* to account for this new mode of communication. *See, e.g.*, Petition at 4, 10, 11, fn 5. Petitioner reaches a bit to suggest tall walls are a new medium; as the pictures in Appendix F illustrate well, tall walls are really just an extra-large version of an old mode of communication. Text messaging would be an example of a new medium of communication, as would computer spam.

To succeed in its as-applied challenge to the City's regulations, Petitioner must show that the City's sign ordinance was applied to it in a manner that unconstitutionally impaired its first amendment rights. However, the City even-handedly enforced the sign regulations, which are justified without regard to any particular message or viewpoint. The regulations are tailored to serve the City's significant interests in regulating aesthetics and promoting traffic safety and, because there are a myriad of advertising options open, including over 12 approved sites for tall wall signs along the 1.2 mile stretch of Sunset Boulevard in the City of West Hollywood, the regulations leave open ample alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Petitioner argues that the *Central Hudson* test applied in this case was a tautology; this conclusion is a result of giving – intentionally or not – short shrift to the City's real considerations: says Petitioner, "because it doesn't like the general look *(Central Hudson* step 2) then that becomes the justification for a ban (step 3) which is obviously the most effective way to 'solve' the 'problem' by simply eliminating all such signs and such a ban is said to go no further than necessary (step 4) because (tautologically) the ban is the only way to 'solve' the 'problem.'" Petition at 24.

Indeed, when fair consideration is afforded, which the Ninth Circuit managed to do even in its sparse disposition memorandum [Petitioner's App. 5], the application of *Central Hudson* test in this circumstance is unremarkable. The City wants to keep traffic flowing and minimize unreasonable distractions to drivers on its

streets and use its land use regulations to create distinct neighborhood ambiance (*Central Hudson* step 2) so it limits particularly distracting tall wall signs to areas where traffic generally moves slowly and channels these larger-than-life billboards to the Sunset Strip where they contribute toward the flamboyancy of the Strip while avoiding conflict with lower-key neighborhoods (*Central Hudson* step 3) thus balancing competing interests to avoid a complete ban without compromising the City's purposes (step 4). The Ninth Circuit further notes that Petitioner did not show any less restrictive means to accomplish the City's legitimate goals. Petitioner's App. 7.

To further complicate the facts of this case, Petitioner implies that it had acquired a grandfathered right to maintain its illegal tall wall signs as a function of unrelated changes in the West Hollywood zoning ordinance. Petition at 6. This theory has been rejected by both the District Court and the Court of Appeals. Petitioner illegally erected the tall wall signs in a zone where they were never permitted.

In any event, this case is not an example of any failure of the *Central Hudson* test to protect real first amendment rights. It is just a case of a property owner wanting to maintain its illegal but lucrative tall wall signs in a zone in which they are not permitted.

3. The Ninth Circuit Determined That Petitioner Waived Its Argument That The City's Ordinance Facially Discriminates Between Commercial And Noncommercial Billboards

To the extent that the Petition seeks to challenge the City's tall wall sign regulations on their face, the Court of Appeals determined that Petitioner failed to raise the argument that the ordinance facially discriminates between commercial and noncommercial tall walls and thus waived the argument. Petitioner's App. 5. In any event, the City's regulations do not distinguish between commercial and non-commercial speech.

4. The District Court And Ninth Circuit Decisions Are Both Based On Application Of State Law And Are Driven By The Determination Of Whether The Tall Wall Billboards Were "Lawfully Erected" Within The Meaning Of The California Outdoor Advertising Act

The central issue in this case is the fact that Petitioner did not have "lawfully erected" tall wall signs within the meaning of the California OAA. Because the tall wall signs were not lawfully erected, Petitioner had no property interest in them and was afforded no protection under the state statute. Petitioner's App. 3-5; Petitioner App. 28-40. Without a protectable property interest, the Petition does not present a ripe issue with respect to whether the City's sign regulations as-applied to Petitioner may be justified by aesthetics alone.

Petitioner presents without much analysis the question of whether the Court of Appeals may "ignore state definitions of property and invent its own definition contrary to state law in order to reverse a District Court liability finding" under the takings clause. Petition at i. First, the Court of Appeals did not create its own definition of "property." The Ninth Circuit flatly states that it is relying on the property interests as defined by California's Outdoor Advertising Act [Petitioner's App. 4], just as the District Court did [Petitioner's App. 30]. Second, as discussed above, the Court of Appeals did not reverse the District Court's finding based on the use of a different definition of "advertising." Both courts relied on the California OAA. The difference between the Court of Appeals' decision and the District Court's decision lies entirely within the interpretation of the City's admonition to the property owner [Lisa Heep's letter] that tall walls are not permitted in the zone in which Petitioner's building is located.

CONCLUSION

The two questions presented in the petition are not squarely raised by this case. While Petitioner rightly laments that *Metromedia* was a badly splintered decision, none of the weaknesses in first amendment jurisprudence that may arise from that fact is relevant to this case. This case does not involve a challenge to a regulation distinguishing between commercial and non-commercial speech, both because the City's regulation does not so distinguish and because Petitioner has waived that argument in its appeal. Whatever misgivings Petitioner documents regarding the current standards in first amendment jurisprudence as it affects the regulation of billboards, the instant case does not present an opportunity to address those concerns. The City documented with evidence in the trial court – whether or not it was legally required to – the basis for its legitimate interests in traffic safety and aesthetics in limiting tall wall signs to the Sunset Strip. More importantly, this case hinges on the fact that Petitioner had no protectable property interest in its two tall wall signs because they were not lawfully erected within the meaning of the California OAA.

For all the reasons set forth above, the City respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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